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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 19[illegible]

No. ~~847~~ 87

MANAGED FUNDS, INCORPORATED,
Petitioner,

vs.

J. JOHN BROUK et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Respondents, J. John Brouk, Jefferson J. Rebstock, Earl R. Rice, W. Munro Roberts, Jr. and James J. Mullen, Jr., in Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 947.

MANAGED FUNDS, INCORPORATED,
Petitioner,

vs.

J. JOHN BROUK et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Respondents, J. John Brouk, Jefferson J. Rebstock, Earl R. Rice, W. Munro Roberts, Jr., and James J. Mullen, Jr., in Opposition.

INTRODUCTION.

Respondents, J. John Brouk, Jefferson J. Rebstock, Earl R. Rice, W. Munro Roberts, Jr. and James J. Mullen, Jr., constitute all of respondents except Jacob Baker and George H. Shields, III, and wherever the word "respondents" is used in this brief it will embrace the five aforenamed. Petitioner will be referred to as "Fund."

OPINIONS BELOW.

The District Court overruled motions of respondents to dismiss the complaint for lack of jurisdiction of the subject matter and also lack of jurisdiction of the person re-

specting respondents, Earl R. Rice and Jefferson J. Rebstock. The District Court filed no opinion. The opinion of the Court of Appeals reversing the order of the District Court is reported at 286 F. 2d 901, and printed as "Exhibit A" to petitioner's petition at page 29.

JURISDICTION.

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Section 44 of the Investment Company Act of 1940 entitled "Jurisdiction of Offenses and Suits" creates concurrent jurisdiction in District Courts of the United States and State Courts of "all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of" the Act.

The question presented is whether the Act creates any federal statutory duties respecting directors of registered investment companies, the violation of which gives rise to a cause of action by an investment company against its directors within the jurisdiction of the District Courts of the United States.

STATUTE INVOLVED.

The statute involved is the Investment Company Act of 1940. The portions relied on by petitioner are set out as Appendix C to petitioner's petition at page 67. Additional sections of such Act, as well as sections of the Securities Exchange Act of 1934, referred to in this brief, are printed as Appendix 1 hereto.

STATEMENT.

The type of case involved on the petition for certiorari here before this court is a civil action in tort for damages brought by petitioner, Managed Funds, Incorporated, a mutual fund and registered investment company, against its investment adviser, the companies which sold its shares, its officers and directors, its New York broker and some of the broker's employees.

The asserted bases of liability essentially are:

1. The investment adviser delegated its advisory function to the broker, but nevertheless was paid for services it did not render.

2. The broker rendered the advisory service in exchange for brokerage business arising from Fund's portfolio transactions.

3. The adviser and the broker handled Fund's portfolio so that there was a deviation from Fund's stated policy of capital growth.

4. That the foregoing acts were in violation of the Investment Company Act of 1940 and the adviser, the broker, the sales companies, the officers and directors of Fund are jointly and severally liable under federal law and the case is within the jurisdiction of the Federal Courts.

There is presented here only the question of federal jurisdiction respecting seven directors.

By the judgment of the United States Court of Appeals for the Eighth Circuit in Brouk et al. v. Managed Funds, Incorporated, et al. (286 F. 2d 901, printed as Appendix (B) to Fund's petition, page 65), the District Court was ordered to dismiss the case as to seven former directors of Fund who attacked the Fund's amended complaint (and the Josephson complaint) by motions to dismiss for lack

of federal jurisdiction of the subject matter and with respect to respondents, Jefferson J. Rebstock and Earl R. Rice, also, lack of jurisdiction of the person (R. 21-28).

On May 12, 1959, Emanuel Josephson brought a stockholder's derivative action for the benefit of Managed Funds, Incorporated, in the District Court of Delaware. This action was subsequently transferred to the District Court at St. Louis (R. 12). This complaint was adopted by intervenor, Protective Casualty Insurance Company (R. 39). On October 23, 1959 Fund filed its amended complaint in the District Court (R. 1). Only Fund appeared on the appeal heard by the Court of Appeals (286 F. 2d 901). **Fund is the only petitioner here.**

The judgment of the Eighth Circuit is, therefore, final respecting the complaint of Emanuel Josephson and the adoption thereof by intervenor, Protective Casualty Insurance Company. It follows that this court's consideration of the petition for certiorari should be limited to consideration of the amended complaint of Fund.

The identity of the parties defendant in relationship to Fund is as follows:

These respondents are five of a group of twelve former directors who are collectively described in petitioner's amended complaint as "outside directors" (R. 3).

Defendants, Hilton Slayton and Hovey Slayton, are former officers and directors of Fund. Defendant, Slayton Associates, Inc., was the investment adviser of Fund under a contract of August 15, 1952 approved by Fund's shareholders and successively renewed by the directors until April 19, 1959. Defendants, Slayton & Company, Inc. and Mutual Fund Distributors, Inc., were underwriters engaged in selling Managed Fund shares to the public. Defendant, Model, Roland & Stone, is a partnership of eleven individuals and are New York brokers (R. 3). Defendants, James S. Stubbs and Harold W. Smith, are employees

of the broker partnership. Defendant, Stephen M. Jaquith, was an associate of the defendant broker partnership. None of these defendants challenged the jurisdiction of the District Court. The case is still pending in the District Court respecting the asserted liability of such defendants. The amended complaint admits the "outside directors" were not conspirators, and did not profit from the alleged wrongful acts, nor receive any so-called wrongful payments (R. 10, 11).

The averment respecting the outside directors is as follows: "On information and belief, the said outside directors, and each of them, had either actual knowledge of the acts hereinafter complained of, or, in the performance of the duties and obligations imposed upon them by law as directors, and by the exercise of ordinary care and diligence in the performance of such duties and obligations, would have acquired knowledge of such acts, and hence are chargeable with having constructive knowledge thereof" (R. 3).

The "acts" referred to are that the adviser, Slayton Associates, Inc., on December 1, 1953, contracted with defendant Jaquith to act as investment counsellor and manager of the securities portfolio of Fund, after which time the adviser received fees for advisory services not performed by reason of the adviser having unlawfully delegated its duties to Jaquith and "abdicated its duties and responsibilities under its advisory contract with Fund (R. 4, 5). The 1953 contract provided Jaquith was to receive $50,000.00 per annum for five years and $35,000.00 for the succeeding five years as minimum payments to apply against brokerage commissions respecting business which the adviser, Slayton Associates, would direct to Jaquith or his designees. The broker defendants, Model, Roland & Stone, it is averred, became the designee and brokerage business was directed to them whereby they received brokerage commissions in excess of $1,500,000.00 (R. 5). The

brokers are averred to have paid to defendants, Smith & Stubbs, annual brokerage commissions in excess of $50,000.00 a year. It is then averred that after Jaquith and Model, Roland & Stone furnished advisory service the Fund's basic policy of capital growth was not followed and gross mismanagement resulted. Loss and damage to the investment portfolio of Fund ensued, as well as greatly increased brokerage commissions and greater payments under the sales contracts without any benefit to the Fund (R. 6). Following the foregoing specific facts setting out the alleged wrongful conduct of the investment adviser and broker defendants, the amended complaint states:

> "Plaintiff further states, on information and belief, that the defendants committed, or with actual or constructive knowledge, as hereinabove set forth, aided, abetted, acquiesced in or condoned, directly or indirectly, violations of the Investment Company Act of 1940, in that, inter alia,
>
> (a) The plaintiff was operated, managed, and its portfolio securities were selected, in the interest of directors, investment advisers, and other affiliated persons thereof, and in the interest of underwriters, brokers and dealers, rather than in the interest of all classes of plaintiff's security holders; (R. 6)
>
> (b) The plaintiff was caused to publish, circulate and file with the Securities and Exchange Commission required registration statements, amendments thereto, reports and prospectuses, which documents contained untrue statements of material facts or omitted to state material facts required to be stated therein or necessary to make the statements therein not misleading; (R. 7)
>
> (c) The plaintiff was caused to deviate from a fundamental policy recited in its registration statement pursuant to Section 8 (b) (2) of the Act, without being authorized to do so by the vote of a majority of its outstanding voting securities; and

(d) Defendants, Leo Model, Rolf R. Roland, Frits Markus, Robert Rosenberg, Walter H. Berton, Walter S. Morris, Frank L. Thompson and Herman H. Stone, as members of a co-partnership doing business under the name of Model, Roland & Stone, and Stephen M. Jaquith, individually, served or acted as investment advisers of the plaintiff, without a written contract approved by the vote of a majority of the outstanding voting securities of plaintiff." (R. 7).

Respecting Counts II, III and IV of the amended complaint Fund states: "Count II asserts liability for losses under the Securities Act of 1933; Count III bases liability for breaches of fiduciary duties, and Count IV seeks recovery on the claim of conspiracy. Such counts may be joined with petitioner's statutory claim, Hurn v. Oursler, 289 U. S. 238 (1933)." (P. Brief 5). Thus, it is conceded these are common law counts cognizable in a Federal Court only if pendente to a federal case if one is stated by Count I.

The amended complaint presents no question respecting the regulatory provisions of the Investment Company Act and the administration of the law by the Securities and Exchange Commission. There is no averment pointing to any specific provision of the Act whereby a federally created private civil action for damages is authorized or created in favor of an investment company against its directors. The case pleaded is no more and no less than a damage suit in tort attempted to be based upon violation of a federal statute by the Fund, itself a tort-feasor, against its officers and others who were actors with asserted joint liability against directors. The averment that the directors "committed" the violations by others, or condoned the same, or negligently failed to discover and prevent, raises the question whether the Act creates federal rights in favor of mutual funds against their own directors so that federal jurisdiction may be implied respecting private actions for damages.

OUTLINE OF ARGUMENT.

I.

The Investment Company Act of 1940 is not a Federal Corporation Code, superimposed on state law, regulating the internal affairs of every corporation engaged in the mutual fund business and it does not expressly or by implication impose federal standards of responsibility or new federal duties on directors. It does not point to a congressional intent that a body of federal law be fashioned by judicial decision to govern director duties and liabilities.

II.

Asserted conflict between decisions of United States Courts of Appeal must in fact exist to constitute a valid basis for the granting of a writ of certiorari. The question of director duty and liability was not raised or decided in Goldstein v. Groesbeck. The claimed conflict is illusory.

ARGUMENT.

I.

The Fund's Amended Complaint Does Not Support Federal Jurisdiction and the Decision of the Court of Appeals So Holding Is Clearly Correct.

It is appropriate at the outset of this argument to have in mind the Fund disclaims that it is asserting respondent directors are liable as insurers to Fund by virtue of their official character as its directors (P. Pet. 22). Fund's precise contention is summarized at page 26 of its petition as follows:

> "The issue here is neither non-feasance nor mere negligence. The issue here is liability of directors for irresponsible violation of law in the management of other people's money. Even when they do not directly profit by the unlawful operation, they have lent their names to the enterprise and must be held to have accepted the responsibility and duties specifically imposed by the statute. As joint tort-feasors, they must be held to respond in damages if they violate the very provisions of the law which they are appointed to enforce, wherever such violation of duty causes losses to the investors."

To say that non-feasance and negligence are not involved, and that the basis of liability is "irresponsible violation of law" is a complete non sequitur. That directors are "appointed to enforce" the Investment Company Act and are joint tort-feasors with the corporation they serve is in fact an assertion of insurers liability. There are no federally created responsibilities and duties of directors set out anywhere in the Act upon which to predicate federal jurisdiction.

Respondents are in agreement with petitioner that the Investment Company Act of 1940 regulates registered investment companies. We are in complete disagreement that it regulates directors. The Act prohibits more than 60% of the directors to be affiliated with an investment adviser and it follows that 40% of the directors must be unaffiliated. It requires advisory contracts to be approved by shareholders and renewals of advisory contracts require the vote of a majority of the unaffiliated directors, failing which such contracts are void. Advisory contracts are not assignable. An investment company must state its fundamental investment policy and deviation therefrom is prohibited. Such are the provisions of the Act, printed as Appendix C, page 67 of petitioner's petition.

It is true as petitioner argues that stock of mutual funds is sold to persons all over the country and that the industry is a "fourteen-billion dollar industry" (P. Pet., p. 12).

Granting all of this the question remains whether or not the Act is in fact as petitioner asserts "a Federal Corporation Code, superimposed on state law, regulating the internal affairs of every corporation engaged in the mutual fund business", and that it imposes "new standards of responsibility for both inside and disinterested directors, new duties in safeguarding and preventing self dealing operations" (P. Pet., pp. 15, 26). Did Congress by the Act create federal statutory director duties, the violation of which gives rise to director liability whenever the Act is violated by a mutual fund? Conversely when the Act is violated by a mutual fund, are the directors responsible and liable under federal law and in Federal Courts?

The opinion of the Court of Appeals correctly answered these questions in the negative, and its opinion amply supports its conclusion.

When Congress wanted to create statutory duties beyond common law duties and personal liability respecting directors it did so, not by implication, but by precise language. For example, the National Bank Act provides (15 U. S. C., § 93):

> "§ 93. Violation of provisions of chapter; forfeiture of franchise; personal liability of directors.
>
> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. R. S., § 5239; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

The foregoing federally created statutory liability is precisely the kind of liability petitioners seek by implication to import into the Investment Company Act. To do so would cause the Federal Courts to embark upon an immense task of fashioning a body of federal law to settle the multitude of questions certain to arise. What statute of limitations would apply? Is there joint and several liability? If so, is there contribution? What degree of care, ordinary, gross or willful is applicable? Does violation equal liability, per se, or is violation prima facie evidence of negligence?

Although the Safety Appliance Act was involved, the principle enunciated by this court in Gilvary v. Cuyahoga Valley Railway Company, 292 U. S. 57, 78 L. Ed. 1123, l. c. 1127, is applicable. This court held:

> "Unless excluded by congressional enactment under the commerce clause, state law governs the respective liabilities and rights of railroad carriers and their employees growing out of injuries suffered by the latter whether in interstate or intrastate commerce. (Citing cases.) The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. (Citing cases.) The purpose exclusively to regulate need not be specifically declared. (Citing cases.) But ordinarily such intention will not be implied unless, when fairly interpreted, the Federal measure is plainly inconsistent with state regulation of the same matter. (Citing cases.)
>
> The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. U. S. C., title 47, § 2. Its requirements were by the Act of 1903 extended to all their vehicles. (Citing cases.) So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent, complementary, additional, or otherwise. (Citing cases.) The imposition of penalties (id., § 6) and abrogation of assumption of risk (id., § 7) are measures for enforcement.
>
> A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize the

right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employer's Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (U. S. C., title 45, § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages and beneficiaries in case of death."

Congress refrained from expressly creating any private actions and hence did not incorporate limitation, contribution, joint and several liability and like provisions into the Investment Company Act with one exception. Section 30 (f) [15 U. S. C. A. 80a-29 (f)], of the Investment Company Act relating to self dealing in a fund's securities provides that a director, among others, is subject to the same duties and liabilities as those imposed by Section 16 (b) of the Securities Exchange Act of 1934 [15 U. S. C. A. 78p (b).] This section in creating the private civil action is specific. It says:

"78p (b) For the purpose of preventing the unfair use of information which may have been obtained by such . . . director, . . . by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . shall inure to and be recoverable by the issuer . . . Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after re-

quest or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized." . . . [15 U. S. C. A. 78p (b).]

No other private civil actions are provided for anywhere in the Act, except those authorized to be brought by the Securities and Exchange Commission.

The Congressional approach in situations respecting federally created liabilities of directors under Securities Acts is well illustrated by the discussion of the Court of Appeals in Martin v. Hull, 92 F. 2d 208. The Court was considering director liability under the Securities Act of 1933, which expressly by its terms makes a director liable to purchasers when a registration statement contains untrue statements. [Securities Act of 1933, § 11 (a, c), § 11 (b) (3) (c), as amended, 15 U. S. C. A., § 77k (a, c), § 77k (b) (3) (c)]. Referring to the House Committee Reports the court stated, l. c. 210:

"According to the statement of the House conferees accompanying the Conference Report on the bill, 'a point of difference between the House bill and the Senate amendment concerned the civil liability of persons responsible for the flotation of an issue. The Senate amendment imposed upon the issuer, its directors, its chief executive and financial officers, a liability which might appropriately be denominated as an insurer's liability. They were to be held liable without regard to whatever care they might have used for the accuracy of the statements made in the registration statement. The House bill, on the other hand, measured liability for these statements in terms of reasonable care, placing upon the defendants the duty, in case they were sued, of proving that they had used reasonable care to assure the accuracy of these statements. The standard by which reasonable

care was exemplified was expressed in terms of a fiduciary relationship. * * * In choosing between these two standards of liability, the Senate accepted the standards imposed by the House bill.' This standard in the 1933 act is set forth in section 11 (c) (48 Stat. 82) as follows: 'In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship.'

"The standard of reasonable care was restated in the Securities Exchange Act of 1934, which amended section 11 (c) to read as follows: '(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.' [15 U. S. C. A., § 77k (c)]."

The foregoing emphasizes that when Congress enters the field of director responsibility it does so by specific language. It is mindful of the kind of liability it imposes, who may sue and the defenses to be available to directors. Reference to the corporation acts of the states shows that by these codes director liability for corporate acts is the subject matter of detailed legislation spelling out the duty, the degree of care, joint liability, rights of contribution and like provisions. (Vol. 2, Model Business Corporation Act Annotated, American Bar Foundation, page 2, § 43.)

When this court considered the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U. S. C., § 185), and concluded that this legislation created federal rights such as to require the fashioning of federal law, it considered

the Senate Reports and noted specific references to "a right of action in the Federal Courts" (Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448, 1 L. Ed. 2d 972, l. c. 978, 77 S. Ct. 912). The Court of Appeals in Brouk concluded and held that the legislative history of the Investment Company Act not only does not point to Congressional intent to create federally protected rights for mutual funds against their directors, but to the contrary indicated a Congressional intent not to enter the field of director liability. This field was left to the respective laws of the several states. That Fund has available its state law remedies is evident from the three common law counts of its complaint.

The Court of Appeals limited its decision to the narrow fact question presented by the amended complaint and amply demonstrated the correctness of its holding that Congress refrained from entering the field of director liability, and the Investment Company Act did not justify implying director duties and implying federal jurisdiction of private civil actions of the kind presented by Fund's complaint.

II.

The Decision of the Court of Appeals for the Eighth Circuit in Brouk et al. v. Managed Funds, Inc., et al., 286 F. 2d 901, Involving the Investment Company Act of 1940 Does Not Conflict With the Decision of the Court of Appeals for the Second Circuit in Goldstein v. Groesbeck, 142 F. 2d 422, Involving the Public Utility Holding Company Act of 1935.

Where a petition for certiorari is sought to resolve an alleged conflict between Courts of Appeal there must in fact be a conflict. (Layne & Bowler Corporation v. Western Mill Works, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712.)

While it is true as petitioner points out that the jurisdictional sections of the Public Utility Holding Company Act and the Investment Company Act of 1940 are the same, there are many material differences in their provisions as would be expected since the Acts regulate different industries. The facts involved in the Bronk and Goldstein cases are not comparable. The questions decided are different as will be apparent from analysis of the Goldstein case.

In the Goldstein case Dora Goldstein, as shareholder of American Power and Light Company, brought a stockholder's derivative action in the District Court for the Southern District of New York against Electric Bond & Share Company, the top holding company of a public utility system, and twenty-two officers and directors of Electric Bond and its subsidiary, Ebasco Services, Incorporated, and nineteen corporate defendants. The action was brought in the right of four operating companies alleged to have contracted with Ebasco for construction and services in violation of the Holding Company Act which made service and construction contracts with unregistered holding companies void. An accounting for profits received by Ebasco was sought from it and Electric Bond and certain of their officers and directors.

Five individual and four corporated defendants moved to dismiss "on the ground, as to them, the venue was not properly laid in the Southern District of New York." These motions were granted except as to two individuals, residents of New York. The remaining defendants then moved to dismiss on the ground indispensable parties were lacking. The District Court thereupon dismissed the complaint.

On appeal the court reversed. It held that plaintiff as a stockholder could maintain a double derivative action in the Federal Court as a stockholder of the parent corpora-

tion in the right of its subsidiaries. It then held that the action was properly brought under the Holding Company Act under the void contract section. Venue, said the court, was therefore governed by section 25 of the Act and was properly laid in the Southern District of New York because contrary to the District Court's holding some of the acts under the void contracts occurred in that district (142 F. 2d, l. c. 425-6).

Aside from the recital in the opinion that there were director defendants of Electric Bond and Share and its subsidiary, Ebasco, there is no discussion of director liability. The averments of the complaint respecting directors do not appear. The complaint was not attacked for lack of federal jurisdiction of the subject matter. No such question was presented or decided. Such being the case the asserted conflict of the Bronk case with the Goldstein case is non existent and illusory.

In Brown v. Bullock, the recent decision of the District Court of New York, much relied on by petitioner, there was involved a combined derivative and shareholder class action by a shareholder of a mutual fund against its directors, investment adviser and underwriter for alleged violations of the Investment Company Act (C. C. H. Federal Securities Law Reporter Current Par. 91013, page 97354). Unlike the Bronk case the complaint charged arbitrariness, collusion, gross negligence and reckless disregard of duty on the part of the individual directors, and that there was an unlawful and willful conversion by them. No such question is presented by petitioner's amended complaint which is not a class action by shareholders. The distinction between Fund's complaint and a shareholder's action is a matter of legal substance and significance as was noted by Judge Medina in Howard v. Furst, 238 F. 2d 790, l. c. 793, wherein the court held the 1934 Securities Exchange Act created no federal jurisdiction respecting

corporate actions against directors. As petitioner has stated, the Brown case is on appeal and the decision of the District Court is not final. The conclusion of the District Court that the legislative history of the Investment Company Act shows a Congressional intent from which there can be implied private civil actions within the jurisdiction of Federal Courts against directors of mutual funds is erroneous as has been demonstrated in this brief and by the opinion in the Bronk case.

Respondents agree with petitioners and the accepted rule announced by this court that the Federal Rules permit notice pleading and complaints are not to be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle plaintiff to relief. Equally well settled by this court is the requirement that jurisdiction must affirmatively appear. The principle is stated in Thomas v. Ohio State University Trustees, 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160, l. c. 163, as follows:

> "That the jurisdiction of a circuit court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which, in legal intendment, it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; and that, for the purposes of suing and being sued in a circuit court of the United States, the members of a local 'corporation' are conclusively presumed to be citizens of the state by whose laws it was created, and in which alone the corporate body

has a legal existence,—are propositions so firmly established that further discussion of them would be both useless and inappropriate."

The pleader must point not just to a federal statute, but to a federal statute creating federal duties and rights of action in Federal Courts. This, respondents assert, petitioner has failed to do. Its claim of jurisdiction is based on two implications—first, that federal director duties are implied, and—second, that a private federal civil action is implied. Doubts are resolved against jurisdiction not in favor of jurisdiction.

CONCLUSION.

In conclusion, petitioners respectfully submit that for the reasons set out in this brief and those expressed by the Court of Appeals in its opinion the petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1.

Statutes Involved.

Investment Company Act of 1940, Section 30 (f), 54 Stat. 836; 15 U. S. C. A. 80a-29:

> "Reports and financial statements of investment companies and affiliated persons
>
> (f) Every person who is directly or indirectly the beneficial owner of more than 10 percentum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 78p of this title upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities. Aug. 22, 1940, c. 686, Title I, § 30, 54 Stat. 836."

Securities Exchange Act of 1934, Section 16 (b), 48 Stat. 896; 15 U. S. C. A. 78p:

> "§ 78p. Directors, officers, and principal stockholders
>
> (b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security

was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Securities Exchange Act of 1934, Section 18, 49 Stat. 1379, 15 U. S. C. A. 78r:

"§ 78r. Liability for misleading statements

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading)

who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued. June 6, 1934, c. 404, § 18, 48 Stat. 897, May 27, 1936, c. 462, § 5, 49 Stat. 1379."